## APPENDIX A

### Findings and Opinion of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Criminal No. 58-208-W

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UNITED STATES OF AMERICA

v.

BERNARD GOLDFINE

---

Criminal No. 58-209-W

UNITED STATES OF AMERICA

v.

MILDRED PAPERMAN

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FINDINGS, CONCLUSIONS, and OPINION

December 19, 1958

WYZANSKI, D. J.

1. On December 10, 1958 the United States filed petitions for attachment for criminal contempt against Bernard Goldfine and Mildred Paperman, and simultaneously Fred G. Pastore, Group Supervisor, Intelligence Division, Internal Revenue Service, filed against the same persons petitions for civil contempt. All these proceedings arose out of asserted violations of this Court's Interim Order of December 5, 1958. This Court heard the criminal and civil cases in one set of hearings, Tuesday, December 16, and yesterday, December 18.

2. This set of findings and conclusions relates solely to the attachments for criminal contempt, those proceedings having been finished, and argument had thereon. The attachments for civil contempt abide the presentation on Monday, December 22, 1958, of a written motion by defendants to amend the December 5 Order, and argument of counsel thereon, and on the other questions presented in the civil cases.

3. The history of the criminal cases begins in the summer of this year. Duly authorized agents of the Internal Revenue Service then started an investigation of the tax liability of five corporations in which defendant Goldfine was interested: Lebanon Mills Corporation, Lebandale Mills, Inc., George Mabbett & Sons Company, Strathmore Woolen Company, and Northfield Mills, Inc.

4. Defendant Goldfine, at all material times, has been president and treasurer of the first, second, and fourth of these companies, and has been president of the third. By virtue of such offices he has been in a position to exercise control over the records of those corporations. Even as to the minute books of those corporations, he has been in a position to direct the clerks of those corporations to produce them before an appropriate public authority. Defendant Goldfine has authorized defendant Paperman to produce before Internal Revenue Service authorities requested documents belonging to Strathmore Woolen Company. Moreover, she, at all material times, has been in control of the records of Northfield Mills, Inc. as well as the records of Strathmore Woolen Company.

5. On July 21, 1958 duly authorized agents of the Internal Revenue Service served administrative subpoenas upon appropriate officials or representatives of the five corporations. In the cases of the first four corporations, defendant Goldfine was the official named in the subpoenas. The subpoenas in each case covered a number of types of documents. For present purposes, it will be sufficient to say that

the administrative subpoenas embraced, among other types of documents, these seven records, hereafter called *the seven listed records*:

(a) from Lebanon Mills Corporation, the accounts receivable ledger for the years 1952 through 1957 (See Exhibit AA)

(b) from Lebanon Mills Corporation, the accounts payable ledger for the years 1952 through 1957 (See Exhibits AB and AC)

(c) from Strathmore Woolen Company, the accounts receivable ledger for the years 1953 through 1957 (See Exhibit E)

(d) from Strathmore Woolen Company, the accounts payable ledger for the years 1953 through 1957 (See Exhibit D)

(e) from Strathmore Woolen Company, the cancelled checks for the years 1953 through 1957 (See Exhibit F)

(f) from Northfield Mills, Inc., the accounts receivable ledger for the fiscal years ending April 30, 1953 through April 30, 1957 (See Exhibit T).

(g) from Northfield Mills, Inc., the accounts payable ledger for the fiscal years ending April 30, 1953 through April 30, 1957. (See Exhibit U)

6. To avoid any suggestion of unfairness, it should be specifically stated and emphasized that the administrative subpoenas called for surely more than half a ton of documents, covered many years besides those listed above, and were cast in terms of undifferentiated generality. The reason that this opinion concentrates on the aforesaid seven records is because with respect to them the evidence is so clear that they command an inevitable conclusion. The only reason to refer to other documents is to see whether for

some reason the facts that those other documents were covered by administrative or judicial subpoenas, or were produced by defendants in response to such subpoenas, furnishes some exculpation, excuse, or mitigating circumstance for the defendants' failure to produce one or more of the seven listed records.

7. After the administrative subpoenas were served, the corporations named therein, through appropriate officers and counsel, requested the Internal Revenue Service representatives not to insist on production at the Service's offices at 55 Tremont Street, Boston, in accordance with the terms of the subpoenas, but instead to examine the records at Kneeland Street. As a matter of convenience, The I.R.S. representatives did not press for immediate compliance with the subpoenas.

8. During the summer they examined the records at the Kneeland Street offices of defendant Goldfine. In August or thereabouts each of the seven listed records was personally observed by at least one of the I.R.S. representatives. For example, Agent William L. Donovan examined the Northfield Mills Inc. accounts receivable ledger and accounts payable ledger, and indeed saw included in their bindings a Yale Wool Waste Co. account which was not so included at the time these ledgers were subsequently offered in evidence to this Court by the defendants. (See the portions of Ex. V read into evidence during the re-direct examination of William L. Donovan). It was during this same summer season that Agent Patrick J. Mullens observed duplicate deposit books, cancelled checks, and check book stubs of Lebanon Mills Corporation, which have never been produced in response to this Court's Interim Order.

9. After this examination at the Kneeland Street offices, Pastore determined to require compliance with the administrative subpoenas.

10. On November 5, at Pastore's instruction, Agent James P. Barry made a formal demand for the Lebanon, Lebandale, and Strathmore records. Defendant Goldfine said that the accountants were working on the books. Barry then talked to defendant Paperman about other corporate records, and received a similar answer.

11. Thereupon, in what is known on our docket as Case E.B.D. 7-8-81-W, on December 3, 1958 Pastore filed a petition for enforcement of the aforesaid administrative subpoenas. December 5 this Court held a hearing. On the same day, December 5, this Court issued what it entitled an Interim Order. The defendants' counsel admit that this Order was duly served on the defendants. This Order covered the seven listed records and also a great many other documents, indeed so many that they certainly would weigh over 1200 pounds and would require a cubic container of at least 6 feet on a side.

12. The seven listed records, however, were plainly described in this Court's Interim Order. No one, either before the order was issued, when it was issued, or at any time before the second day of the present contempt hearing (that is, yesterday, Thursday, December 18) ever suggested to the Court that the Interim Order failed clearly to demand production of these seven listed records or was burdensome or invalid because these seven listed records were kept in loose-leaf binders in which there were *on some (but not all) of the detachable pages* entries covering current 1958 items which were not embraced within the Court's subpoena. And this omission becomes more significant in view of this Court's specific warning on December 5, the day it issued the Interim Order, that defendants, if they failed to comply would be held accountable in proceedings for both civil and criminal contempt.

13. Following the entry of this Court's Interim Order which required production of the seven listed records as well as many other records before the Internal Revenue

Service at 55 Tremont Street, by noon on Monday, December 8, 1958, the present defendants sought to appeal to the Court of Appeals. That Court granted a stay until 3 P.M. on December 8, and then denied the appeal for lack of jurisdiction.

14. Neither on Friday, December 5, nor on Monday December 8, nor at any other time did defendants file in this or any other Court any motion to defer the time of production of records on the ground that compliance was physically impossible.

15. From the evidence submitted in this criminal case, it appears that defendants delivered approximately 1300 pounds of material to the I.R.S. at 3 P.M. on Monday, December 8, and that though they delivered some minor items in the next few days, they did not deliver to the I.R.S. the seven listed records until 1:30 P.M. on Thursday, December 18. Moreover, they made this delivery only after their counsel had first offered them as exhibits in this Court, and this Court had commented that such delivery was not a compliance with the Interim Order. On all the evidence, this Court finds that there was no physical impossibility, nor any impracticability, nor any substantial inconvenience which interfered with the delivery to the I.R.S. at 3 P.M. on Monday, December 8, 1958, of the seven listed records. Even more clearly there was no interference of any kind with delivery on Tuesday, December 9, 1958, or on Wednesday morning, December 10, 1958.

16. Late on Wednesday afternoon, December 10, 1958, the United States filed against the two defendants separate petitions for attachment for criminal contempt. In 58-208 W, Count One alleged the wilful failure of defendant Gelfine to produce, in accordance with the Interim Order, the first two of the seven listed records, as well as other items. Counts Two and Three related to other matters. In 58-209 W Count One alleged the wilful failure of defendant Paper

man to produce, in accordance with the Interim Order, the third, fourth, and fifth of the seven listed records, as well as other items; and Count Two alleged the wilful failure of the same defendant Paperman to produce, in accordance with the Interim Order, the sixth and seventh of the seven listed records.

17. This Court scheduled a hearing for Tuesday, December 16, 1958. No postponement was sought.

18. The Government moved to quash a subpoena which defendants had served on Pastore on Monday afternoon, December 15, requiring him to produce everything which defendants had in fact delivered up to 4:25 P.M. December 15, 1958 to the I.R.S. This Court granted the motion. But the Government agreed that in fact somewhat over 1300 pounds of records had been delivered!

19. During the first day of testimony, December 16, 1958, the Government offered Pastore and half-a-dozen of his subordinates who testified as to the investigations they had conducted and the observations they had made. Defendants sought permission to examine the inter-office or departmental reports which the several witnesses had made. The Court granted this permission in full. Defendants' counsel examined most of these reports during 6 hours on Wednesday, December 17, 1958, on a day when the Court recessed to allow such examination. Defendants' counsel examined the balance of the reports, (which, pending a ruling by this Court, the Government had temporarily withheld,) between 1 P.M. and 3 P.M. on Thursday, December 18, 1958, when again the Court recessed to allow such examination.

20. In the course of the cross-examination of the I.R.S. agents, the defendants' counsel themselves introduced the seven listed records, Exhibits AA, AB, AC, E, D, F, T, and U, (AB and AC, being two parts of what this opinion calls one record).

21. Defendants' counsel admitted that they themselves had seen these records, and labeled them, at least as early as Monday, December 14, 1958.

22. The records when offered in court were shown not to be bound books with stitched pages, but loose leaf folders containing pages clamped together by posts that were readily unclamped or unscrewed. Moreover, it appeared that most of the pages had entries all of which antedated 1958, but that some of the pages had entries for periods of time both preceding and including 1958, and perhaps a few of the pages had entries only for 1958. Counsel conceded that the pages were susceptible of photostating, though no concession was made as to how promptly the photostating could have been done. Finally, counsel conceded that at no time before Thursday, December 18, had anyone drawn to this Court's attention the fact that Exhibits AA, AB, AC, E, D, F, T, and U had within their four corners both records called for by the Interim Order and also records not so demanded, and that at no time had anyone proposed segregation of the two types of records, photostating, partial surrender, or other accommodating techniques.

23. After the Government's evidence had concluded, and cross-examination of the Government's witnesses had been completed, defendants' counsel, following two recesses requested by them, decided to leave the case to be decided on the evidence already before the Court. It should be noted that, despite an argumentative thrust by defendants' counsel suggesting that defendants' failure to produce the seven listed records might be due to advice of counsel, when this Court specifically commented that defendants had offered no evidence to support that argument, this comment did not lead defendants' counsel to take any action, or to make any reply, or to seek to re-open the case.

24. The facts having been recited, it now becomes appropriate to apply the relevant principles of law which have recently been re-stated in *Nilva* v. *United States*, 352 U.S. 385.

25. It is, of course, elementary that these being criminal cases, the Government has the burden of proving beyond a reasonable doubt every constituent element of the crimes charged.

26. It is also elementary that to warrant a conviction on these pleadings, which were filed late in the afternoon of December 10, 1958, the Government must prove beyond a reasonable doubt that the crimes had been committed, and that each constituent element existed, on December 10, 1958, before the crimes were charged.

27. In a case of alleged criminal contempt for wilful failure to comply with a judicial subpoena or order addressed to a defendant requiring him to produce a record, that is, in the sort of case now at bar, the Government must ordinarily prove these six elements of the crime beyond a reasonable doubt: (1) that the Court issued an order for the production at a particular time and place of a record adequately described in the order, (2) that the defendant was served with (or otherwise knew of) the order, (3) that the record existed at the time the order was served, (4) that the defendant had control (or lawful power to acquire control) of the record, (5) that the defendant failed to produce (or cause the production of) the record, and (6) that the defendant acted wilfully.

28. In the case at bar the first two elements are so beyond dispute as not to require comment.

29. Defendants' counsel suggest that as to the third element, the Government has not shown that defendants knew on December 8, 9, or 10 that these seven listed records existed. But with respect to element 3, *as distinguished from element 6*, the Government need not prove

that a defendant knew or should have known on the date a record was due to be produced that the record then existed. As to element 3 it is sufficient to prove beyond a reasonable doubt that the record existed on the date the order was served. And, it is incontrovertible that Exhibits AA, AB, AC, E, D, F, T, and U existed on December 5, 6, 7, 8, 9, and 10 just as surely as they existed on December 18 when defendants themselves offered the records in open court.

30. As to element 4, the Government proved that defendant Goldfine was president of Lebanon Mills Corporation. As such he had control of Exhibits AA, AB, and AC. The Government also proved beyond a reasonable doubt that defendant Paperman had actual control of Exhibits E, D, F, T and U.

31. Item 5 is proved by the fact that defendants did not deliver the seven listed records to the I.R.S. until 1:30 P.M. yesterday, Thursday, December 18.

32. With respect to item 6 the Government proved wilfulness in several ways. It will be enough to recite that each defendant knew in August 1958 of the existence of such of the seven listed records as he or she has been required to produce; he or she had reported in November 1958 to Agent Barry that the record was being worked on by accountants; and he or she knew that records of that type were kept in an ordinary business office in Kneeland St. Thus each defendant knew on December 5 of the existence of the record which he or she was commanded to produce. Failure to produce promptly such a known and readily reached record is wilful defiance.

33. The fact that other records were supplied is irrelevant in this case. One can imagine a situation where a defendant was so continuously occupied in carting to the I.R.S. records actually supplied, that he had no second's pause in which to get hold of a particular additional record.

This is no such case. Defendants were not continuously occupied until the afternoon of December 10 in supplying records. And they never asked for more time, or asserted that they were pressed, or applied for modification of the Interim Order.

34. Nor is it any excuse that the exhibits containing the seven listed records also contained other records irrelevant to this case. Often a court requires the production of an exhibit which has a combination of both relevant and irrelevant matter, or a combination of both matter required by the court for testimonial purposes and matter required by the subpoenaed person for business purposes. If the respondent to the subpoena believes a segregation is desirable or necessary, it is incumbent on him to propose the segregation or duplication of the exhibit. And usually a dozen techniques to that end are available and would be approved by a court. Here neither defendant proposed any such technique. Instead, he chose to fail to comply with the Interim Order, in so far as it covered these seven listed records.

35. What defendants' reasons were for refusing to respond with respect to these seven records this Court does not know. And it is no part of the Government's burden to prove these reasons. The Government need not prove that defendants did or did not consult counsel. The Government need not prove that defendants were or were not abstracting from the loose leaf records pages that once were clamped into the record. All that the Government must prove is the defendants' wilful disobedience. And that the Government has shown beyond a reasonable doubt.

36. Moreover, there is no showing that either defendant had, in the words of Rule 17 (g), Federal Rules of Criminal Procedure, "adequate excuse" for his or her failure to comply with this Court's Interim Order of December 5 to produce the seven listed records.

37. This Court, therefore, finds and concludes that defendant Bernard Goldfine is guilty as charged in Count One, but is not guilty as charged in Counts Two and Three of Cr. 58-208-W, and that defendant Mildred Paperman is guilty as charged in Counts One and Two of Cr. 58-209-W. Both defendants shall appear at 10 A.M. Monday, December 22, 1958, in Courtroom 6, United States Courthouse, Boston to be sentenced for their respective criminal contempts committed in defiance of this Court's Interim Order of December 5, 1958 and the specific warning to them which accompanied the issuance of that Interim Order.

s/ CHARLES EDWARD WYZANSKI, JR.
*United States District Judge*

December 19, 1958

**APPENDIX B**

**Opinion of Court of Appeals**

# UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. 5460

BERNARD GOLDFINE, *Defendant, Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

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No. 5461

MILDRED PAPERMAN, *Defendant, Appellant,*

v.

SAME

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[169 F. Supp. 93]

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Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges.*

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*Harold Rosenwald*, with whom *Burton L. Williams*, *James R. McGowan* and *Paul A. Powell* were on brief, for appellants.

*Andrew A. Caffrey*, Assistant U. S. Attorney, with whom *Anthony Julian*, United States Attorney, and *George H. Lewald*, Assistant U. S. Attorney, were on brief, for appellee.

## OPINION OF THE COURT

July 24, 1959.

MAGRUDER, *Circuit Judge* (Retired). These appeals arise out of perhaps the most publicized cases heard this year. We are unable, however, to find any substance in appellants' contentions.

It appears that during the summer of 1958 the Internal Revenue Service started looking into the tax liabilities of five corporations in which Bernard Goldfine had an interest, namely, the Lebanon Woolen Mills Corporation, Lebandale Mills, Inc., George Mabbett & Sons Company, Strathmore Woolen Company, and Northfield Mills, Inc., at least some of which corporations had filed no income tax returns for several years.

Appellant Goldfine was president and treasurer at all material times of three of these corporations, Lebanon Woolen Mills Corp., Lebandale Mills, Inc., and Strathmore Woolen Co. He was also president of George Mabbett & Sons Co. It is undisputed that by virtue of such offices Goldfine has had, during all material times, the control of the records of these corporations, and that appellant Mildred Paperman has at all material times been in actual control of the records of Strathmore Woolen Co. and of Northfield Mills, Inc.

Pursuant to administrative subpoenas issued by the Internal Revenue Service to assist in its current investigations, the records of these five corporations were made available to agents of the Service at Goldfine's office, 35 Kneeland Street, Boston, Massachusetts. Goldfine instructed the various bookkeepers, including appellant Paperman, to cooperate fully with the Internal Revenue Service.

Subsequently, at the request of counsel for the corporations, the investigation by the Internal Revenue Service

was suspended for sixty days so that agents of the corporations could have exclusive access to the corporate records for the purpose of preparing and filing their delinquent income tax returns. At this time it was made clear to appellants' counsel that the government was not abandoning its subpoenas and its investigation but merely suspending a portion of its inquiry for the sole purpose stated. "Accordingly, when we resume our examination, our audit will not be deemed a new inspection of the taxpayers' books of account within the purview of Section 7605(b), Internal Revenue Code of 1954."

After the expiration of the sixty-day period the Service refused to grant a request for extension and tried without success to obtain the return to it of the corporate records. Finally, on December 3, 1958, Group Supervisor Pastore filed in the United States District Court for the District of Massachusetts a petition for judicial enforcement of the aforesaid administrative subpoenas as provided for in §§ 7402(b) and 7604 of I.R.C. 1954. See the procedure outlined in *Brody* v. *United States*, 243 F.2d 378 (C.A. 1st, 1957), cert denied 354 U.S. 923 (1957). An order to show cause was issued, which came on for hearing before the district court on December 5, 1958. The outcome of this hearing was the issuance by the district court on the same day of a so-called "Interim Order" under which appellants were directed to produce at the office of the Internal Revenue Service, 55 Tremont Street, Boston, certain records of the corporations involved on or before a specified time on Monday, December 8, 1958. At this initial stage of the proceeding the district court elected not to issue a turn-over direction in the breadth requested by the government. Instead it chose to exclude from its interim order the records relating to all tax years with respect to which any contentions had been made by appellants that the taxing authorities had already completed an audit while the documents were previously available

for their inspection, whether or not the United States admitted that such a prior audit had been completed. The district court also chose to exclude from its enforcement order the records relating to any tax year with respect to which appellants had made the contention that the statute of limitations would apply (unless fraud were found). In addition, the district court struck out from the government's proposed order a request for the "stock certificate book" and other unspecified documents of each corporation. An appeal was attempted by the appellants from this interim order. In *Goldfine* v. *Pastore*, 261 F.2d 519 (C.A. 1st, 1958), we denied an application by the appellants for a stay of the district court's interim order pending appeal because we thought that, although a final enforcement order would be appealable, *O'Connor* v. *O'Connell*, 253 F.2d 365 (C.A. 1st, 1958), this was clearly just an interlocutory order from which we were without jurisdiction to entertain an appeal as of right. Later, by order entered February 12, 1959, we dismissed this appeal for lack of jurisdiction.

Claiming that the records had not been produced as set forth in the interim order, the United States Attorney late on December 10, 1958, filed against each of the said appellants a petition for attachment for criminal contempt. The petition against Bernard Goldfine was in three counts. Count I charged that Goldfine was guilty of criminal contempt by willful disobedience of so much of the interim order as related to the production of the records of the Lebanon Woolen Mills Corp. The court found Goldfine guilty on this count. Count II related to the failure to produce the records of Lebandale Mills, Inc., and Count III referred to those of George Mabbett & Sons Co. Since the district court found the defendant Goldfine not guilty on Counts II and III, they will hereafter be disregarded.

The petition for attachment for criminal contempt filed against defendant Mildred Paperman was in two counts.

the first charging willful disobedience in refusing to produce the records of Strathmore Woolen Co., and the second charging willful disobedience in the failure to produce the records relating to Northfield Mills, Inc. The district court found Miss Paperman guilty on both counts.

Appellants have taken these appeals from the respective judgments of conviction of criminal contempt. *169 F. Supp. 93.*

We reject the contention that the evidence was not sufficient to establish, beyond a reasonable doubt, what the district court found, that appellants deliberately and intentionally disobeyed the interim order of December 5, 1958.

The district court's memorandum finding appellants guilty of criminal contempt focused on the following seven so-called "listed records," production of which was required by the interim order:

1. Accounts receivable ledger of Lebanon Woolen Mills Corp. for 1952 through 1957. (Exhibit AA)

2. Accounts payable ledger of Lebanon Woolen Mills Corp. for 1952 through 1957. (Exhibit AB)

3. Accounts receivable ledger of Strathmore Woolen Co. for 1953 through 1957. (Exhibit E)

4. Accounts payable ledger of Strathmore Woolen Co. for 1953 through 1957. (Exhibit D)

5. Canceled checks of Strathmore Woolen Co. for 1953 through 1957. (Exhibit F)

6. Accounts receivable ledger of Northfield Mills, Inc., for April 30, 1952, through April 30, 1957. (Exhibit T)

7. Accounts payable ledger of Northfield Mills, Inc., for April 30, 1952, through April 30, 1957. (Exhibit U)

The district court correctly stated that the burden was on the government to prove beyond a reasonable doubt the presence of these six elements:

> "(1) that the Court issued an order for the production at a particular time and place of a record adequately described in the order, (2) that the defendant was served with (or otherwise knew of) the order, (3) that the record existed at the time the order was served, (4) that the defendant had control (or lawful power to acquire control) of the record, (5) that the defendant failed to produce (or cause the production of) the record, and (6) that the defendant acted wilfully."

We are satisfied that these records and the time and place for their production were adequately described in the interim order, and that, as stated above, the appellants had control over them. They admittedly were served with the order, and they even attempted to appeal from it. There is no doubt that the records existed (and appellants so conceded in oral argument before us), and that they were not produced at the office of the Internal Revenue Service, 55 Tremont Street, Boston, on or before the deadline on December 8. They were actually produced by defendants in the courtroom on December 18, during the contempt trial.

The only one of the six elements which is really in dispute is the sixth one, that the appellants acted willfully in failing to produce the aforesaid records. Willfulness almost necessarily has to be proved as an inference from circumstantial evidence; and in this case we cannot say that the district court erred in drawing that inference. Indeed we cannot see how the court could have failed to draw such inference. The government does not have the burden of negativing all possible excuses for noncompliance with a court order. It is enough to make out a prima facie case for the government

to show, as the government did below, that the appellants, in response to the interim court order calling for the production of corporation records, refused to surrender them when they were in existence and within their control. See *Vilva* v. *United States*, 352 U.S. 385, 392 (1957). Counsel for the defendants suggested at various times that their failure to produce the seven listed records, as required in the interim order, might have been due to the advice of counsel, which might negate willfulness. But that was only suggestion, and although the district court twice commented that the defendants had offered no evidence to support that suggestion, counsel neither took any action, made any reply, nor sought to reopen the case.

Though the corporations were located elsewhere, it is conceded, as appears to be clear, that all the "listed records" involved were physically present at Goldfine's office, 35 Kneeland Street, Boston. If defendants could cause the production of the records in the courtroom on December 18, it is difficult to believe that they had no power to produce them a few days earlier at the office of the Internal Revenue Service.

We may assume that, because the interim order was appealable only by a certificate of the district court which was not given and by leave of this court, appellants might defend against even charges of criminal contempt by showing the interim order to be invalid, despite the holding in *United States* v. *United Mine Workers*, 330 U.S. 258 (1947). But it is clear that the interim order, as signed, was not unreasonable or in violation of any rights of appellants or of the corporations.

When these documents were produced in court on December 18, it was for the avowed purpose of demonstrating to the court that they were current records in use by the corporations and that compliance with the interim order would make it impossible for the corporations to conduct

their business. This suggestion of course could not excuse failure to deliver the records contained in Exhibit F, which consisted of one small envelope containing bank statements and a number of canceled checks of Strathmore Woolen Co. covering only the period from 1953 to 1957. Furthermore the excuse is insubstantial, for the reasons stated by the district court in its finding 22:

> "The records when offered in court were shown not to be bound books with stitched pages, but loose leaf folders containing pages clamped together by posts that were readily unclamped or unscrewed. Moreover, it appeared that most of the pages had entries all of which antedated 1958, but that some of the pages had entries for periods of time both preceding and including 1958, and perhaps a few of the pages had entries only for 1958. Counsel conceded that the pages were susceptible of photostating, though no concession was made as to how promptly the photostating could have been done. Finally, counsel conceded that at no time before Thursday, December 18, had anyone drawn to this Court's attention the fact that Exhibits AA, AB, AC, E, D, F, T, and U had within their four corners both records called for by the Interim Order and also records not so demanded, and that at no time had anyone proposed segregation of the two types of records, photostating, partial surrender, or other accommodating techniques."

We find nothing in the record to sustain the contention of appellants to the effect that the interim order was invalid in its failure to afford appellants a "reasonable time" within which to comply with its requirements. So far as appears, this contention was not made in the district court until the hearing on the charges of criminal contempt; the only previous requests made were for time for counsel to prepare their arguments. Nor did the defendants in-

troduce any testimony in the contempt trial to sustain their theories of unreasonableness.

Other contentions by appellants, which we find it desirable to comment upon specifically, are of a more technical nature. It is suggested, by reference to expressions in dissenting opinions in the Supreme Court, that the convictions of criminal contempt are in violation of the constitutional rights of appellants under the Bill of Rights, in that the charges of criminal contempt were not initiated by a presentment or indictment of a grand jury, and that appellants were convicted by the district court, sitting without a petit jury.

It must be borne in mind that this court, as an intermediate appellate court, would certainly look very foolish if it took its law from a dissenting opinion, even from a dissenting opinion by a justice of the Supreme Court of the United States. In answer to this particular argument, we need only refer to the decisions of the Court in *Nilva* v. *United States*, supra, 352 U.S. 385; *Green* v. *United States*, 356 U.S. 165 (1958); and *Brown* v. *United States*, 359 U.S. 41 (1959). 18 U.S.C. § 402, relied upon by appellants, is pathetically inapplicable, since under the very terms of the section it is said not to be construed as relating "to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same . . . may be punished in conformity to the prevailing usages at law."

Much is made of the fact that the trial for criminal contempt was had before the same district judge (Judge Wyzanski) who issued the interim order alleged to have been disregarded. This procedure is routine in criminal contempt cases. Rule 42 of the Federal Rules of Criminal Procedure, issued by the Supreme Court, does specifically require the trial judge to disqualify himself from sitting at the hearing of a charge for criminal contempt in the

very understandably human situation where "the contempt charged involves disrespect to or criticism of a judge"; but otherwise, the rule contains no provision for a mandatory disqualification. It is said that Judge Wyzanski had obtained an unfavorable impression of appellants while sitting in other litigation in which they were involved. These prior litigations must have been familiar to appellants, but they made no motion before Judge Wyzanski asking him to disqualify himself. Moreover, there is no evidence of such impressions except certain remarks by the court in pronouncing the sentences. These phrases, read in context, cannot serve as the basis for any charge of prejudice. Under the circumstances, and in view of the concession in appellants' brief that there "can be no doubt that Judge Wyzanski made every conscious effort to be objective and impartial in this case," and in view of the inescapable force of the evidence presented by the government, and the obvious fairness of the sentences, we cannot find that the district judge committed an abuse of discretion in failing to disqualify himself on his own motion.

Some reference is made to the sentences, and to the fact which has disturbed the Supreme Court somewhat, that there is no maximum statutory limit to the sentencing power of the district court in criminal contempt cases. Here the judgment of conviction sentenced appellant Goldfine to be committed "to the custody of the Attorney General or his authorized representative for imprisonment for a period of three months." In the judgment of conviction of Miss Paperman, she was committed to the custody of the Attorney General for a period of ten days. These sentences which, if anything, err on the side of moderation, are justified and well within approved limits. See *Green* v. *United States*, supra, 356 U.S. 165; *Brown* v. *United States*, supra, 359 U.S. 41; and *Brody* v. *United States*, supra, 243 F.2d 378, cert. denied 354 U.S. 923. We find no abuse of discretion in this particular.

*Judgments will be entered affirming the judgments and orders of the District Court.*

## APPENDIX C

### Statutes Involved

18 U.S.C. 401. Power of the Court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. 402. Contempts Constituting Crimes.

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law. June 25, 1948, c.645, 62 Stat. 701, amended May 24, 1949, c.139, Sec. 8(c), 63 Stat. 90.

18 U.S.C. 3691. Jury Trial of Criminal Contempts.

Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.

26 U.S.C. §7210. Failure To Obey Summons.

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e) (2), 6421 (f) (2), 7602, 7603, and 7604(b), neglects

to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

26 U.S.C. §7402. JURISDICTION OF DISTRICT COURTS.

(a) *To issue orders, processes, and judgments.* — The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To enforce summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 U.S.C. §7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. Aug. 16, 1954, 9:45 a.m., E.D.T., c.736, 68A Stat. 901

26 U.S.C. § 7604. Enforcement of Summons

(a) *Jurisdiction of district court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such persons resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under sections 6420(e) (2), 6421(f) (2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such per-

son, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.